

The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

V.

MONSANTO COMPANY, et al.,

## Defendants.

No. 2:16-cv-00107-RAJ-MLP

**PLAINTIFF'S SURREPLY IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO EXCLUDE PROPOSED  
EXPERT TESTIMONY BY DR. LISA  
RODENBURG**

**NOTE ON MOTION CALENDAR:  
August 26, 2022**

## ORAL ARGUMENT REQUESTED

PL. SURREPLY IN OPPOSITION  
TO DEF'S. MOTION EXCLUDE  
EXPERT TESTIMONY BY  
DR. LISA RODENBURG  
(2:16-cv-00107-RAJ-MLP)

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1 Monsanto's reply in support of its motion to exclude the testimony of Dr. Lisa  
 2 Rodenburg ("Reply") (Dkt. #419) improperly seeks to introduce new evidence: specifically,  
 3 Exhibits A (Dkt. #421-1), B (Dkt. #421-2), and C (Dkt. #421-3) to the Declaration of Lisa N.  
 4 DeBord in Support of Defendants' Reply in Support of Motion to Exclude the Expert Testimony  
 5 of Lisa Rodenburg ("DeBord Decl.") (Dkt. #421).

6       "It is not acceptable legal practice to present new evidence or new argument in a reply  
 7 brief." *United Specialty Ins. Co. v. Shot Shakers, Inc.*, C18-0596JLR, 2019 WL 199645, at \*6  
 8 (W.D. Wash. Jan. 15, 2019), *aff'd*, 831 Fed. Appx. 346 (9th Cir. 2020) (quoting *Roth v. BASF*  
 9 *Corp.*, C07-0106MJP, 2008 WL 2148803, at \*3 (W.D. Wash. May 21, 2008)). "[W]here new  
 10 evidence is presented in a reply ..., the district court should not consider the new evidence  
 11 without giving the [non-]movant an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478,  
 12 1483 (9th Cir. 1996) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir.1990)).

13       Courts in this District routinely strike new evidence presented in a reply. *E.g.*,  
 14 *Houserman v. Comtech Telecomm. Corp.*, 509 F. Supp. 3d 1301, 1303 (W.D. Wash. 2020)  
 15 ("Defendants' submission of Mr. Goolsby's testimony for the first time in their reply is  
 16 improper.") (citing *Provenz v. Miller*, 102 F.3d at 1483); *Bridgham-Morrison v. Nat'l Gen.*  
 17 *Assurance Co.*, C15-0927RAJ, 2015 WL 12712762, at \*2 (W.D. Wash. Nov. 16, 2015) ("For  
 18 obvious reasons, new arguments and evidence presented for the first time on Reply ... are  
 19 generally waived or ignored."). Indeed, a "request to strike certain materials in the reply brief is  
 20 an appropriate, indeed the only, basis for filing a sur-reply." *Farnes v. Metro. Grp. Prop. & Cas.*  
 21 *Ins. Co.*, 2:18-CV-1882-BJR, 2019 WL 4044102, at \*1 (W.D. Wash. July 31, 2019).

22       The City challenges three of the four exhibits Monsanto submitted with its reply. Those  
 23 exhibits are: (1) an undated PowerPoint presentation prepared by Dr. Rodenburg titled  
 24 *Identifying PCB sources through fingerprinting*, *see* DeBord Decl. (Dkt. #421), at ¶ 2 and Ex. A  
 25 (Dkt. #421-1); (2) a PowerPoint presentation prepared by Dr. Rodenburg dated June 19, 2013,  
 26 and titled *PCBs in pigments, inks and dyes: Documenting the problem*, *see* DeBord Decl. (Dkt.

1 #421), at ¶ 3 and Ex. B (Dkt. #421-2); and (3) a transcript of a webinar given by Dr. Rodenburg  
 2 on September 25, 2017, *see DeBord Decl.* (Dkt. #421), at ¶ 3 and Ex. C (Dkt. #421-3). Each of  
 3 these exhibits has been in Monsanto’s possession for years. *See DeBord Decl.* (Dkt. #421), at  
 4 ¶¶ 2–4 (identifying Exhibits A, B, and C each as an exhibit to a deposition of Dr. Rodenburg  
 5 taken on February 7, 2018, in the *City of Hartford, et al. v. Monsanto Company, et al.*). The  
 6 exhibits do not rebut arguments raised by Plaintiff City of Seattle (the “City”) in its opposition  
 7 to Defendants’ motion to exclude. Rather, Monsanto cites these exhibits in further support of its  
 8 contention that Dr. Rodenburg has expressed opinions about “the ubiquitous presence of  
 9 byproduct PCBs.” Reply (Dkt #419), at 1; *see also id.* at 4. Monsanto made the same argument  
 10 in its motion. *See Defendants’ Daubert Motion to Exclude Testimony of Lisa Rodenburg*  
 11 (“Motion”) (Dkt #320), at 1–2.

12 Monsanto has no excuse for failing to submit evidence it contends is relevant to the  
 13 arguments made in its motion to exclude the testimony of Dr. Lisa Rodenburg when it first filed  
 14 its motion, thereby depriving the City of the opportunity to respond. The Court should not allow  
 15 Monsanto to sandbag the City by submitting new evidence with its reply and should strike the  
 16 exhibits in question.

17 Even if the Court were inclined to consider Monsanto’s new evidence, none of the three  
 18 documents undermine the reliability of the data Dr. Rodenburg relied on or reliability of the  
 19 methodology she employed to reach the opinions expressed in her report in this matter. Nor do  
 20 the exhibits reflect any discrepancy between the opinions Dr. Rodenburg offers in this case  
 21 statements she has made outside of the litigation. While Monsanto falsely suggests that  
 22 Dr. Rodenburg has stated that byproduct PCBs are “the ‘main problem’ facing municipalities  
 23 like the City of Seattle,” Dr. Rodenburg in fact stated that byproduct PCBs are a particular  
 24 problem for Spokane County. Reply (Dkt #419), at 4. Significantly, immediately after her  
 25 comment about Spokane County, Dr. Rodenburg stated that, in “some of these places, like,  
 26 especially, like the Green-Duwamish River, you see that you’ve got the green, the blue, and the

1 purple bars. Those are all Aroclors. So the Green-Duwamish River *is totally contaminated by*  
 2 *Aroclors.*" DeBord Decl., Ex. C (Dkt #421-3), at 53:20–54:1 (emphasis added). Further,  
 3 Dr. Rodenburg's observation that PCB congeners that may be associated with byproduct PCBs  
 4 have been found in a number of locations and that byproduct PCBs have been found—by Dr.  
 5 Rodenburg herself—to be a significant source of PCBs in a very small number of cases, does  
 6 not undermine her conclusion in this case that Monsanto's PCBs are the source of the vast  
 7 majority of PCB contamination in the Lower Duwamish Waterway. *See* DeBord Decl., Ex. A  
 8 (Dkt #421-1), at 17–40.

9 Because Monsanto could and should have submitted the challenged exhibits with its  
 10 motion, rather than waiting to submit them with its reply, the exhibits should be struck. But,  
 11 even if they are not struck, the new evidence Monsanto submitted with its reply fails to support  
 12 its motion to exclude Dr. Rodenburg's testimony.

## 13 I. CONCLUSION

14 For the foregoing reasons, Plaintiff City of Seattle respectfully requests that the Court  
 15 strike Exhibits A (Dkt #421-1), B (Dkt #421-2), and C (Dkt #421-3) to the Declaration of Lisa  
 16 N. DeBord ("DeBord Decl.") (Dkt #421).

1 DATED this 31st day of August, 2022.

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